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No. 134.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1906.

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JAMES H. McKEN

[redacted]

ERIE RAILROAD COMPANY,
Petitioner,

vs.

ERIE & WESTERN TRANSPORTATION COMPANY,
Respondent.

BRIEF FOR PETITIONER.

CHARLES E. KREMER,
Proctor for Petitioner.

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Of Counsel.

Geo. Hornstein Co., Printer, Chicago.

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No. 339

ERIE RAILROAD COMPANY,
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vs.

ERIE & WESTERN TRANSPORTATION COMPANY,
Respondent.

BRIEF FOR PETITIONER.

This case grows out of a collision which occurred on the 21st day of October, 1891, on the Detroit river, between the Propeller New York, then owned by the Union Steamboat Company, and the Propeller Conemaugh, then, as now, owned by the Erie & Western Transportation Company.

On the 11th day of November, 1891, the Erie & Western Transportation Company as owner of the Propeller Conemaugh, and as trustee and bailee of her cargo, filed a libel in the District Court of the United States for the Eastern District of Michigan, to recover the sum of $70,000 for damages sustained by the Propeller Conemaugh and her cargo by reason of the said collision.

The Union Steamboat Company, as the owner of the Propeller New York, filed its answer to said libel, denying all liability for the collision, but claiming that the damage to the New York by reason of the collision, amounted to $3,000.

A trial was had in the District Court, and the court held both propellers at fault.

The New York, 53 Fed. Rep., 553.

This decision was, on petition for re-hearing, reversed, and the New York was held solely at fault.

Thereupon the following insurance companies filed their petitions and intervened in said cause, claiming damages to the cargo of the Conemaugh, which they had insured in the following amounts:

British & Foreign Marine Insurance Co. (Ltd.)	$ 2,421.84
Insurance Company of North America	7,950.09
Union Marine Insurance Company	2,553.06
Marine Insurance Company	916.57
	$19,841.56

To all of the petitions of the above intervenors the Union Steamboat filed its answers denying all liability for the collision, and alleging that the fault of the same rested solely upon the Conemaugh.

The owner of the New York then prayed an appeal to the Circuit Court of Appeals for the Sixth Circuit, and this court reversed the decision of the District Court and held the Conemaugh solely at fault for the collision.

The New York, 87 Fed. Rep., 819.

The petition for a re-hearing was denied.

82 Fed. Rep., 814.

A petition for a writ of *certiorari* was then filed on behalf of the Conemaugh and allowed, and this court held both the New York and Conemaugh at fault for the collision.

The New York, 175 U. S., 187.

Upon the mandate issued after this decision, the District Court entered a decree which held the New York liable *for all of the cargo damage* and for one-half of the damage sustained by the Conemaugh.

A petition was then filed by the owner of the New York, in this court, praying that a writ of mandamus, issue to the judge of the District Court, to show cause why he should not obey the mandate of the Supreme Court and enter a decree in conformity with its terms. An order to show cause issued, and after a hearing this court denied the writ, and held that if the owner of the New York felt itself aggrieved, the remedy was by appeal and not by writ of mandamus.

Ex parte Union Steamboat Co., 178 U. S., 317.

Thereupon an appeal was prayed from the decision of the District Court in entering the decree above referred to, and a motion was made by the appellees to dismiss the appeal, which was denied.

The New York, 104 Fed. Rep., 561.

Then the case came up for a hearing on the merits, and the decision of the District Court was affirmed.

The New York, 108 Fed. Rep., 102.

Thereupon a petition for a *writ of certiorari* was filed in this court on behalf of the New York. This was granted, and the case came up for a hearing, and

in its decision this court affirmed the decision of the Circuit Court of Appeals.

U. S. v. *E. & W. Trans. Co.*, 189 U. S., 363.

The court thereupon issued its mandate and the owner of the New York was compelled to pay, and did pay, the decree, which included *all of the cargo damage.*

Thereupon the owner of the New York filed its original libel in the United States District Court at Chicago, against the Propeller Conemaugh to recover the sum of $19,734.61, a moiety of the damages paid on account of the cargo of the Conemaugh, and, which it alleged, should have been borne by the Conemaugh, being one-half of the damages arising out of the collision.

A hearing was had in the District Court and on the 24th day of August, 1904, the court awarded the libelant the sum of $28,815, being the amount of the aforesaid claim and interest thereon.

An appeal was taken and a hearing had in the United States Circuit Court of Appeals for the Seventh Circuit, and this court reversed the decision of the District Court and held that the libel should be dismissed, because the questions to be determined in this case were *res adjudicata* in a court of admiralty by reason of the decisions of this court.

The pleadings in the District Court were the libel, answer, and agreed statement of facts.

We contend that the Court of Appeals erred as follows:

1st. That the Circuit Court of Appeals erred in deciding and holding as follows (Rec., 59):

(5) "That division of cargo damage was not

a right arising *ipso jure* out of the fact of contributory fault on the part of the Conemaugh; and without issue raised thereupon 'of liability of the Conemaugh to her cargo underwriters,' it could not be summarily assumed that because she was found in fault, and liable to the New York for one-half of her damages, she is also liable to the underwriters on her cargo and thus foreclosing defense under the 'special stipulations in her bills of lading,' which are asserted on behalf of the Conemaugh as written therein 'to set up against the claims of underwriters.' * * *

"We are of opinion that adjudication leaves no issue open in the admiralty, between these parties, arising out of the collision; that jurisdiction therein cannot be exercised to enforce equalization of the burdens imposed upon one and the other party in the former decree, in contravention of its express terms."

Thereby misconstruing the opinion of this court in the case of *New York*, 178 U. S., 317.

The concluding words of which are as follows:

"But no question of recouping one-half of such damages to the cargo from the moiety of damages awarded the Conemaugh was made by counsel or passed upon by this court. It is now insisted that under the cases of *The Chattahooche*, 173 U. S., 540; 43 L. Ed., 801; 19 Sup. Ct. Rep., 491; and *The Albert Dumois*, 177 U. S., 240; 20 Sup. Ct. Rep., 595; 44 L. Ed.; this should have been done. This may be so; but it is an entirely new question, *quite unaffected by the case of the New York*, and if the court erred in refusing to allow such recoupment, the remedy is by appeal, and not by mandamus."

2d. The Circuit Court of Appeals erred in deciding and holding as follows (Rec., 59):

"Equal division as well of this cargo damage was strenuously sought on behalf of the New York in the final hearing before the trial court, in both reviewing tribunals upon the same argument and citations which are urged upon this appeal, but such relief was denied. Like contention was renewed here, for independent relief, upon averment that the cargo damage was thus imposed for want of pleading in the case, setting up the claim by way of recoupment. Be that as it may, the fact remains that the decree passed, touching all interests with all damages, apportioned as stated. In other words, the respective rights and liabilities of the parties arising out of the collision were thus adjudicated in admiralty, with all parties before the court and all issues heard as raised by them respectively."

Thereby misconstruing the opinion of this court in the case reported in 189 U. S., 366, which is as follows:

"The decree against it, the New York, now seeks to shift in part to the owners of the Conemaugh; indeed, not to shift it, but virtually vacate it and put the claims of the cargo owners into controversy with the Conemaugh. This, we think, should not be done. The cargo owner's judgments were affirmed by this court, as we have seen, and they are none the less entitled to them under the circumstances of this record, although as to some of them they were represented by the Conemaugh. The New York having been in fault, was responsible for the cargo, and if, as between her and the Conemaugh, she have a claim for recoupment, the way is open to recover it. We think that the District Court rightly construed our mandate."

Thereby also misconstruing the opinion of the U. S. Circuit Court of Appeals in this case, reported

in 108 Fed. Rep., 102, which is as follows, on page 106:

> "The right of set-off or counter-claim or recoupment being in no way presented by any pleading in this case, was not so involved in the nature of the decree rendered as to make it error if the matter was passed *sub silentio*. It was not a defense which the appellant was obliged to then present. The mere fact that there are cross demands will not operate as an estoppel, if, in fact, the cross demand was not presented and adjudicated."

And again, on page 107, the court say:

> "The appellants, not being obliged to assert their cross demand or claim for contribution by way of recoupment in this cause, did not do so. This leaves them free to assert their claim for contribution in an independent proceeding against the Conemaugh. No special equity appearing, this will be no injustice. The motion to remand, with leave to amend the pleadings, is therefore denied."

BRIEF AND ARGUMENT.

The Court of Appeals, we believe, has misconstrued the prior opinions of this court in this case. It decides and holds as follows:

> "The prior proceedings in admiralty, averred in the present libel, were of the character contemplated by the rule for ascertaining, dividing and charging the liability between all the parties in interest. The damages suffered by the steamers respectively and the damage to the cargo of the Conemaugh were assessed, and while aggregate damages to both steamers were properly equalized, the decree charges the cargo damage against the New York alone. Equal division as well of this cargo damage was strenuously sought on behalf of the New York in the final hearing before the trial court, and in both reviewing tribunals upon the same argument and citations which are urged upon this appeal, but such relief was denied. Like contention is renewed here for independent relief upon averment that the burden of cargo damage was thus imposed for want of pleading in the case, setting up the claim by way of recoupment. Be this as it may, the fact remains that the decree passed touching all interests with all damage apportioned as stated. In other words, the respective rights and liabilities of the parties arising out of the collision were thus adjudicated in admiralty with all the parties before the court and all issues heard as raised by them respectively. These conclusions thereupon are unmistakably expressed in the opinions and carried out in the final decree. * * * The adjudication of liability arises out of the collision and apportionment thereof which thus appear in, as we believe, the proceeding in admiralty contemplated by the rule (as defined

in the *North Star supra* and *Chattahooche supra*) for all cases of maritime collision. It is unquestionably *res adjudicata* upon all matters involved in that contest. * * * We are of opinion that such adjudication leaves no issue open in the admiralty between these parties arising out of the collision; that jurisdiction therein cannot be exercised to enforce equalization of the burden imposed upon one and the other party in the former decree in contravention of its express terms."

The court, therefore, has construed the opinions of this court *as absolutely foreclosing the right of the owner of the New York to recover in admiralty any part of the amount which it paid to the owners of the cargo of the Conemaugh.* The court does not say that the owners of the New York are not entitled to recover the moiety of damages from the Conemaugh, but practically that this court expressly held that there was no such right.

It simply denies the libelant the right to recover herein through a misconception of what this court had to decide in the former trials, and what it did decide.

The effect of the decision of the Circuit Court of Appeals is, to deprive the owners of the New York of a clear right to compel the Conemaugh, to share with it the cargo loss arising out of the collision, which this court found and held to have been due to the joint fault of both vessels.

That each of two vessels held jointly at fault should equally bear the damage resulting from such negligence, has been frequently decided and is a rule of damages in admiralty settled beyond all question.

Schooner Catherine v. *Dickinson*, 17 How., 170.

North Star, 106 U. S., 17.
Manitoba, 122 U. S., 97.
The Albert Dumois, 177 U. S., 240.

There is nothing in this case in the way of a limitation of liability under the statutes that is pleaded to take away or limit this rule.

Prior to the decision of the District Court for the Eastern District of Michigan, when it entered a decree on the first mandate in the original case, there was no decided case, and no established practice, that required the filing of a cross libel or petition praying for recoupment, set-off or contribution.

On the contrary in all of the following cases recoupment was allowed without such pleadings.

The Eleonora, 17 Blatch., 88.
Leonard v. *Whitwell,* 10 Ben., 638.
The C. H. Foster, 1 Fed. Rep., 733.
Atlantic M. Ins. Co. v. *Alexander,* 10 Fed. Rep., 279.
The Canima, 17 Fed. Rep., 271.
The Hercules, 20 Fed. Rep., 305.
The Job T. Wilson, 84 Fed. Rep., 149.
The Livingstone, 104 Fed. Rep., 918.
Albert Dumois, 177 U. S., 240.
Manitoba, 122 U. S., 97.

In fact there is an unbroken line of authorities to support the proposition that additional pleadings, besides libel and answer, were not necessary to enable a Court of Admiralty to properly apportion the damages between wrong-doers, when these were the libelant and defendant then before the court.

The District Court, in pursuance of the mandate of this court, however, held in this case that it could

not be done without a cross libel or petition—the Circuit Court of Appeals for the Sixth Circuit sustained the District Court in this, but said (108 Fed. Rep., 107):

> "The appellants, not being obliged to assert t ir cross demand or claim for contribution b way of recoupment in this cause, did not do s This leaves them free to assert their claim for contribution in an independent proceeding against the Conemaugh. No special equity appearing, this will be no injustice. The motion to remand, with leave to amend the pleadings, is therefore denied."

The Circuit Court of Appeals denied the motion to amend the pleadings in this case, because the amount to be recovered by recoupment could be recovered by the owner of the New York in an independent proceeding against the Conemaugh, in which it could assert its claim for contribution.

Had it thought otherwise it is fair to assume it would have granted the motion to amend the pleadings in that court, or would have remanded the case with leave to the owners of the New York to do so.

An appeal in admiralty entitles the appellant to a trial *de novo.*

> *Gilchrist* v. *Chicago Ins. Co.,* 194 Fed. Rep., 566.

It is almost needless to say that the Court of Appeals did not consider that its decision settled and ended the question of the apportionment of the damages, or passed upon the question of whether there should be contribution or not.

Proctors for the Conemaugh even when the case was before this court, on the second writ of *cer-*

tiorari, being Case No. 97, admitted in their brief in that case, that these parties had a right to an independent action, for they say in their brief, at page 11:

> "So far as recoupment is a right and obtains, it is a definite right, subject to proper limitations. A party is not compelled to resort to it; it is optional whether he assert the right in the original suit. Where in case of collision one vessel is libeled, it is optional with the owner of the other vessel to file counter claim by way of cross-libel or to bring an independent action. This was determined by this court in *The Juniata,* 93 U. S., 337; and followed in the present case, 175 U. S., 187."

Neither court nor counsel up to this point in this litigation, viz., after the court's decision in the original case, 175 U. S., 187, and on the petition for a writ of mandamus, 178 U. S., 317, supposed that the question of contribution was barred by the rule of *res adjudicata.*

The Court of Appeals for the Sixth Circuit holds so in almost so many words. It would not, in the exercise of that broad and liberal jurisdiction in admiralty cases have denied the motion to amend the pleadings, and thereby deprived the New York of the well established right to offset or recoup, if it had thought there was no independent right of action.

Up to this point neither this court nor the Circuit Court of Appeals held that the question of contribution was *res adjudicata.* We are therefore compelled to look for it in this court's last decision, viz:

U. S. Co. v. *E. & W. T. Co.,* 189 U. S., 363.

It is all there is left. If it cannot be found here

it does not exist, and the Circuit Court of Appeals was in error in so deciding.

The language of this case, quoted by the Court of Appeals, that is supposed to be so fatal in its effect, and so destructive of what up to this time was considered by the Court of Appeals for the Sixth Circuit as a clear right to proceed by independent suit, is as follows:

> "The decree against it, the New York now seeks to shift in part to the owners of the Conemaugh. Indeed, not to shift it, but virtually to vacate it and put the claims of the cargo owners into controversy with the Conemaugh. This, we think, should not be done."

In conclusion the Court of Appeals comments upon this language as follows:

> "The present decree in effect not only accomplished the modification of the former decree, *which was thus refused by both appellate tribunals*, but bars contest of liability on the part of the Conemaugh to the cargo owners. Surely if the appellate jurisdiction is inadequate for such object, it is not within the coordinate jurisdiction of another court sitting in admiralty, to grant relief from the terms of the prior decree or to re-open the controversy."

The court is clearly in error when it says that the decree of the District Court in this case now *modifies the former decree and bars the contest of liability on the part of the Conemaugh to the cargo owners.* This is an error because the answer of the Conemaugh sets out all her defenses, including the clauses in her bill of lading. All these defenses were considered and passed upon by the District Court, and

were again urged before the Circuit Court of Appeals in this case.

The owner of the Conemaugh *has not lost* any of its rights, and can and has in this proceeding urged all the defenses, which it claimed it could not do if recoupment was allowed without pleadings in the original case.

With all of its rights preserved the Conemaugh cannot complain of the proceedings in the present case; every opportunity is given to put forth all her defenses. As the Court of Appeals for the Sixth Circuit said, referring to an independent proceeding by the New York, as in this case: "No special equity appearing, this will be no injustice."

The Conemaugh has answered every allegation of the libel in this case, and has set out in full all of the defenses which the ingenuity, enterprise and diligence of able counsel could suggest or urge. Upon these there was full hearing in the District Court. This clearly appears from the opinion of the District Court.

The Court of Appeals has given the following words of this court (189 U. S., 363) too much weight, referring to the attempt to recoup cargo damage against the Conemaugh, viz: "This should not be done." The succeeding words of the opinion, however, are not quoted and they are:

> "The cargo owners' judgments were affirmed by this court, as we have seen, and they are none the less entitled to them under the circumstances of this record, although as to some of them they were represented by the Conemaugh. The New York, having been in fault, was responsible to the cargo, *and if, as between her and the*

Conemaugh, she have a claim for recoupment, the way is open to recover it."

The court construed the words, "and if as between her and the Conemaugh, she have a claim for recoupment, the way *is open* to recover it," as if it read the way *was not open* to recover it. As we understand this language, in the light of the opinion of the Circuit Court of Appeals for the Sixth Circuit, this court said, *that the way was open* and not that it had been closed, or that *it had been* open and was open no longer, or that all the questions in the case were *res adjudicata.*

Can there be any doubt what this court meant or intended to convey by these words, in the light of what the Court of Appeals had said, viz., page 106:

> "The right of set-off or counter claim of recoupment being in no way presented by any pleading in the case, was not so involved in the nature of the decree rendered as to make it error if the matter was passed *sub silentio.* It was not a defense which the appellant was obliged to then present. *The mere fact that there are cross demands will not operate as an estoppel, if, in fact, the cross demand was not presented and adjudicated."*

And on page 107:

> "The appellants, not being obliged to assert their cross demand or claim for contribution by way of recoupment in this cause, did not do so. *This leaves them free to assert their claim for contribution in an independent proceeding against the Conemaugh.* No special equity appearing, this will be no injustice. The motion to remand, with leave to amend the pleadings, is therefore denied."

This court, therefore, when it said "*the way is open to recover it,*" affirmed what was said by the Circuit Court of Appeals, as much in this as in its conclusion, that the decree was in conformity with the mandate issued upon the decision in 175 U. S., 187.

And Judge Kohlsaat, in his opinion as to this says, (see Rec., 43):

> "It cannot be that the court meant to decide that the libelant herein should be denied the right to save its rights under the statute of limitations by amendment *and be remitted to a barren attempt to assert them in a separate proceeding which would be barred by the statute.*"

It is apparent that the district judge, too, construed the language of this court, "*that the way is open,*" as entitling the New York to file its libel to recover what it could not recoup because no pleadings demanding it had been filed in the former suit.

The Court of Appeals now say this language of this court means that THE WAY IS NOT OPEN, *or that the way was once open, but now was open no longer,* and barred forever.

The Court of Appeals denies the right to file this libel, because they say this court has so decided and held, viz:

> That this claim now urged has been adjudicated.
>
> That the New York has had her day in court.
>
> That she cannot be heard again.
>
> That the questions urged are *res adjudicata,* and all this in the face of these words of the court, "*if as between her (New York) and the Conemaugh she have a claim for recoupment, the way is open to recover it.*"

When we filed this libel we certainly supposed we were pursuing that way.

The court has decided in this case that a Court of Admiralty has jurisdiction of a libel for contribution. There is therefore but one question which the court must first decide, viz: Has this court, in its opinions, foreclosed libelant's right to recover contribution?

In our judgment it has not, and the decision of the Court of Appeals should be reversed.

The questions between the New York and Conemaugh, for contribution, were never passed upon by this court, or any other. They could only arise under the doctrine of recoupment. This court expressly decides that on the original hearing this question was not raised, argued or decided. (*New York,* 178 U. S., 317.) This court again decided that the New York could not be heard because of the absence of the necessary pleadings, *and therefore the New York as against the Conemaugh on the question of contribution has never had its day in court,* and the questions are, therefore, not finally disposed of between these parties, and the rule of *res adjudicata* therefore does not apply.

The decision of this court in *New York,* 175 U. S., 187 (which is the original case), does not decide that the New York is debarred from suing for, or collecting contribution of the Conemaugh. The court's decision means no more than that the innocent cargo owner or his underwriter may pursue and recover from one or both of the joint *tort feasors.* In this case the right existed against the New York alone, because the Conemaugh had not been impleaded with the New York, had not been made a

party defendant with the New York, and therefore there could be no recovery against her. It was not that no recovery was to, or could be had against her, or because she was not liable, but solely because she was not a party. No suit had been brought against the Conemaugh by the cargo owners. Suit had only been brought against the New York, and the court finding her, as well as the Conemaugh, at fault for the collision, the cargo owner had a right to recover from her, not alone a moiety of the damage, but the whole of it. This was done under a rule established by this court in the well known cases of *The Atlas,* 93 U. S., 302; *The Juniata,* 93 U. S., 337.

The District Court therefore entered such a decree, and denied the right of the New York for contribution, and this solely because no pleadings had been filed, asking for contribution.

The District and the Circuit Court of Appeals both held that the right of recovery by the New York must be founded upon some affirmative pleading, and could not be obtained by recoupment or set-off without these. It was the method and not the right that was questioned. It might be said that so far and so much was the court's mind working along established lines of well known remedies, and early methods of securing them, and so strong are these in the most of men at the bar that one might be justified in saying that there could be no *right without writing,* or, to use a homely comparison, the patient must take his remedy out of a bottle, for that is the time-honored way of administering it; better die than break the rule or the bottle. Practice and procedure must be respected even at

the expense of justice or law. The profound respect that these courts had for form and procedure was the foundation of the denial of the right to recover contribution. Not that the right did not exist, or that the court had condemned without reason the New York to pay more than the moiety of the damage, for something she had done or left undone; not for this, but because it had not been properly asked for

The rule of division of damages in admiralty cases was not changed or disturbed, and is today as much a rule of law as it ever was.

Then why should the Circuit Court of Appeals in this case hold that the language referred to in the original case amounted to a decision that one party should be condemned to pay more than the other that was equally at fault for the collision? In this the court erred. The opinion of this court does not admit of this construction; the intention and meaning of this decision is apparent from the authorities cited. These do not hold that there should be unequal division of damages between *tort feasors.* Or that there could not be recovery in an independent suit for contribution; quite the contrary, for the court say, *Juanita*, 93 U. S., 337-338:

> "Whatever their rights may be as against Purseglove, by reason of such payment of more than one-half, must be settled in another proceeding. It cannot be done in this litigation."

This case clearly recognizes the right to recover in another proceeding.

Recoupment is the right whereby mutual demands

which arise out of the same transaction may be adjusted in one action.

Am. & Eng., Vol. 25, 547.

It is of common law origin and independent of the statutes of set-off.

4 Minor's Inst. (2nd Ed.), 706.

1 Chitty, Pl. (16 Am. Ed.), 595.

31 Am. Rep., 775.

8 Viner's Abr., Title Discount, 556.

But may be equity early transposed.

Grand L. v. *Knox,* 20 Mo., 433.

Chitty, Pl., 14 Am. Ed., Vol. 1, *p. 568:

> "At common law, and independently of the statutes of set-off, a defendant is in general entitled to retain, or claim by way of reduction, all just allowances or demands accruing to him or payments made by him, in respect of the *same* transaction or account which forms the ground of action. But this cannot be termed a set-off in the strict legal sense of the word, because it is not in the nature of a cross demand; or a mutual debt, but rather constitutes a deduction, rendering the sum to be recovered by the plaintiff so much less."

It applies to common law and equity. Also admiralty.

Snow v. *Caruth,* 1 Sprague, 324.

Nichols v. *Tremlett,* 1 Sprague, 361.

Defendant not bound to recoup.

Minor's Institutes, Vol. 4, part 1, p. 656.

Burwell v. *Knight,* 51 Barbour, 267.

Jennison Hard. Co. v. *Godkin,* 112 Mich., 57.

Wells on *Res Adjudicata,* 236, 305.

I.

THE RULE OF RES ADJUDICATA.

Upon what is *res adjudicata*, we say:

Van Fleet on Former Adjudications, Sec. 256, says:

> "Unless the defendants contest an issue with each other, either upon the pleadings between them and the plaintiff, or upon cross pleadings between themselves, it will not be *res adjudicata* in a litigation between them. * * * A judgment against them, if there are no issues between them, does not bind them as to each other."
>
> Citing *State Bank of St. Louis* v. *Bartlett*, 114 Mo., 276.
>
> *O'Connor* v. *New York Land Co.*, 28 N. Y., 544.

In *Bulkley* v. *House*, 21 L. R. A., 247, the court said:

> "A judgment against several defendants is not conclusive as between themselves in respect to their rights and liabilities toward each other."

In the case of *State Bank of St. Louis* v. *Bartlett*, the court said:

> "The rule is that, when the parties to a suit were not adversaries under the pleadings, the judgment against them does not conclude either, so as to prevent him from showing in a contest between themselves that the obligations should be borne by the other."

In the case of *Koelsh* v. *Mixer*, 53 Ohio St., 207, an action was brought by a surety on a bond against his co-surety for contribution. Defendant pleaded a former adjudication in a case in which plaintiff and defendant had been parties defendant, and that de-

fendant was released from liability. The Supreme Court would not allow the plea, saying:

> "Whilst the exact limits of the doctrine of *res adjudicata* in its application to some cases are not definitely settled, it is accepted as generally true that the judgment relied on for that effect in subsequent litigation must have been pronounced on the same issues, between the same parties or their privies, standing in adversary character to one another.
>
> "*It is not enough that an issue may have been joined* between the obligee and the defendant, as to the liability of the latter on the bond. Whatever that issue may have been, it was not in issue between himself and his codefendant, the plaintiff in this action, and could not, therefore, conclude the latter; though parties to the suit they were not such in an adversary character, being simply codefendants to the suit on the bond. * * *
>
> "It is the general rule that parties to a judgment are not bound by it, in a subsequent controversy between each other, unless they are adversary parties in the original action."

The opinion in this case contains citations to many pertinent authorities.

In this case, as to the cargo damage the Conemaugh and New York were only co-defendants.

The law applicable to the present state of facts is correctly stated in the case of

> *Cottingham* v. *Earl of Shrewsbury,* 3 Hare, 27.

> "If a plaintiff can not get at his right without trying and deciding a case between co-defendants, the court will try and decide that case and the co-defendants will be bound. But if the relief given to the plaintiffs does not require

or involve a decision of any case between the co-defendants, the co-defendants will not be bound as between each other by any proceedings which may be necessary only to the decree the plaintiff obtains."

McCall v. *Carpenter,* 18 Ohio, 297.

Packet Co. v. *Sickles,* 5 Wall., 580.

In the latter case the court (at page 592) says:

"As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se,* in must appear, *by the record of the prior suit,* that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the intrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

In *Cromwell* v. *County of Sac,* 94 U. S., 353, it was held:

"In all cases, therefore, where it is sought to apply estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be *as to the point or question actu-*

ally litigated and determined in the original action, not what might have been thus litigated and determined."

In *Last Chance Mining Co.* v. *Tyler Co.*, 157 U. S., 683, it was held:

> "A former judgment on a different matter of dispute between the same parties is conclusive only as to matters decided and *not as to other matters that might have been decided."*
>
> *New Orleans* v. *Citizens' Bank*, 167 U. S., 371.

In Amer. & Eng. Ency. of Law, 1st Ed., Vol. 21, p. 200, the rule supported by many adjudications is thus laid down:

> "It is not only necessary that every issue should be directly adjudicated upon in order to subject it to the doctrine of *res adjudicata*, but such issues must be definite, clear and certain. No degree of probability will be sufficient. Absence of doubt and presence of certainty is of vital importance."

The rule in the Ohio courts is the same.

In *Love* v. *Trueman*, 10 Ohio St., 45, it was said:

> "Where a judgment or decree is relied on by way of evidence as conclusive *per se* between the parties to a subsequent suit, it must appear by the record of the former suit that the particular controversy sought to be precluded was therein necessarily tried and determined."

In *Porter* v. *Wagner*, 36 Ohio St., 471, it was held that:

> "Where a judgment is relied on as an estoppel, the question *is not what the court might have decided in a former action, but what in fact it did decide, as shown by the judgment.*

> "A judgment is conclusive by way of estoppel only as to facts, without the proof or the admission of which it would not have been rendered."

The utmost that can be claimed in this case is, that the court *might have decided to apportion the loss in this case between the New York and the Conemaugh according to the rule of damages cognizable in admiralty.* The court expressly disclaims this, however, in *Ex parte Union Steamship Co.*, 178 U. S., 317, for it says, on page 319:

> "But no question of recouping one-half of such damages to the cargo from the moiety of damages awarded the Conemaugh was made by counsel or passed upon by this court. It is now insisted that under the cases of the *Chattahoochie*, 173 U. S., 540; the *Albert Du Mois*, 177 U. S., 240, this should have been done. This may be so, but it is an entirely new question, and unaffected by the case of the *New York*, and if the court erred in refusing to allow such recoupment the remedy is by appeal and not by mandamus."

This explains the previous decision of the court, which is the one we contend has been most misunderstood by the Circuit Court of Appeals. It dispels all doubt upon the subject that the question of recoupment and set-off, was not considered by the court in the former decision, and therefore that decision could not be held to be *res adjudicata.*

In the subsequent decision, 189 U. S., 363, the court says:

> "The subsidiary propositions are that if one of the offending vessels paid more than half the damages to a third party they may recoup or set off such excess against any claim for dam-

> ages which the other vessel may have, without bringing in the other vessel as a co-defendant under admiralty rule 59, or filing other pleadings than an answer to the libel. * * *"

The court then proceeds to say:

> "And if, under some circumstances, the other propositions could be applied (which is not necessary to decide) they cannot be under the circumstances of this case. The petitioner made no claim for a division of damages upon the original trial of the case."

And farther on in the decision the court says:

> "The New York having been at fault, was responsible to the cargo, *and if as between her and the Conemaugh she have a claim for recoupment, the way is open to recovery.*"

Our conclusion from this decision is that "the way being open," this proceeding is justified, and that the court did not, by this decision, or its previous decision, dispose of this question of a right to recover the excess, and therefore this proceeding is properly brought.

The court having held that both vessels were at fault, and each should bear one-half the damages, can it be said that in any of the prior decisions of this court it denied the right of the New York to claim contribution because that right did not exist? and that although the court said that "the way was open," that it did not thereby mean that any proceeding in any other court could be taken to recover the excess of the New York's contribution? What did the court mean by that expression if it did not mean that the owners of the New York could recover in a separate proceeding what was denied them in

the former cases because of the absence of the necessary pleadings?

II.

THAT THIS IS NOT A MARITIME CAUSE OF ACTION AND THEREFORE NOT WITHIN THE JURISDICTION OF THE ADMIRALTY COURT.

In all of the efforts that were made to induce the District Court, and the subsequent Appellate Courts to permit the libelant here to offset and recoup the amount for which this libel has been filed, the proctor for the Conemaugh, with energy and enthusiasm, insisted that the libelant had not invoked the provisions of Admiralty Rule 59, of this court, and therefore was not in court so as to be entitled to demand affirmative relief against the Conemaugh for any part of the damages paid to the insurers of her cargo.

If the New York, therefore, had the right under Rule 59 to pray for and obtain process against the Conemaugh, so that it could have recovered from the Conemaugh in the former proceeding, then certainly the right exists to proceed under an original proceeding like this.

Prior to the adoption of Rule 59 there was no rule or process which permitted a third party to be brought into a proceeding in admiralty as a co-defendant by a defendant, and there was therefore no other way open to proceed, but in an original proceeding, by filing a new libel. The rule is not compulsory.

Even under Rule 59 it is not always possible to obtain service of process upon the third party, and it might be necessary to proceed against such third

party in another district. In such emergencies a new suit is the only way to reach the other party. It certainly is not in harmony with the broad and liberal equitable principles which prevail in a Court of Admiralty to turn a suitor away from its forum to obtain relief for a liability which was laid upon him in a Court of Admiralty, especially when all subsequent proceedings relate directly to the same matter, which is of substantially the same character, involving the same parties that were involved in the former admiralty proceeding, with no change of ownership of the vessel.

The case of *The Mariska,* 107 Fed. Rep., 989, is directly in point. In that case the owners of the Helena filed their libel against the steamers Jay Gould and Mariska for the loss of the Helena. No service was had on the Mariska, and the Gould being alone in court, was condemned to pay the entire damages sustained by the Helena. The owner of the Gould thereupon filed its libel against the Mariska for contribution. It was contended on behalf of the Mariska in that case, as it is here, that the cause of action was not maritime because the liability arose out of the payment of a decree, and not out of the original collision. The court, however, found that a right of action existed for contribution and that the Admiralty Court had jurisdiction. It seems to us that this decision is clearly in point and the Circuit Court of Appeals bas so held. In that case the court say:

> "The fundamental equitable principle is to equalize the burden among those who should bear it. *The North Star,* 106 U. S., 17. The supposed difficulty arises only when one of the

offending vesels is not a party to the proceeding in which fault is adjusted. In such case it is not possible for the court to adjust the equities or to decree contribution. Does the right of contribution, therefore, fail? Can it be that the law is incapable to furnish a remedy for the recognized right? Will it be permitted, as at common law, to one uninjured by the wrong of two or more to hold one for the injury and to absolve the others? We can not think the Courts of Admiralty are so weak and so limited in power that they can not find means to enforce a recognized right."

The court then cites from the case of *The Hudson*, 15 Fed. Rep., 162, in which Judge Brown says:

"In effect, while the libelant has a maritime lien upon each vessel *in solido* for his whole damage, so that both are liable jointly and severally as principals, yet as between themselves the several vessels liable are virtually in the situation of sureties for each other for the payment by each of one-half of the damages, and each vessel, like other surties in equity, has such a legal interest in the libelant's enforcement of his lien upon the other that the court must, by its decree, carefully protect this interest whenever the parties are before it, and on failure to do so its decree will be reversed. From this well settled recognition and enforcement of a right of contribution as a substantial legal right, when the parties are before the court, it would seem to result necessarily that, if only one vessel is sued, where another is equally liable, *either an independent suit for contribution must be allowed to the latter (former?)*, or else the other vessel must be brought into the original cause, if that can be done without any substantial injury to libelant. It would be a gross anomaly to say that the court must, by its decree, recognize and enforce a right of apportionment between several vessels defendant, if they all hap-

> pen to be parties, but yet has no power to bring in one of them if absent, or to afford a several remedy against it."

Analogous to this case in principle as to its character being maritime, and if so carying with it a lien, we have the cases arising in general average. General average contribution is defined in Benedict's Admiralty, Sec. 295, as follows:

> "The subject matter of a demand for contribution being maritime, it is clearly a case of admiralty and maritime jurisdiction, and the court may resort to such of its modes of preceeding as may be appropriate to give the relief. If the demand be a lien upon any property within the rule of the court the proceedings may be *in rem*. If the party liable to pay them is within reach of the court the proceedings may be *in personam*."

In the case of *Dupont* v. *Vance*, 19th How., 162, the court say:

> "On full consideration we are of opinion that where cargo is lawfully jettisoned its owner has, by the maritime law, a lien on the vessel for his contributory share of the general average compensation, and that the owner of the cargo may enforce payment thereof by proper proceeding *in rem* against the vessel or against the residue of the cargo, if it has not been delivered."

That was a case of jettison of a part of the cargo, and a libel filed against the brig Ann Elizabeth for contribution to this loss by jettison.

If the owner of a cargo jettisoned has a lien upon the vessel or the remainder of the cargo for contribution, then in case the cargo so compelled to contribute should seek to file a libel against the vessel

to recover back money paid because of a negligent stranding of the vessel which gave rise to the jettison, we would then have a case parallel to the one at bar. Could there be any doubt as to the jurisdiction of a Court of Admiralty in such a case, although the cause of action and the damage was due to the payment of the contribution, and not to the negligent stranding, the latter being merely a prior or remote cause, which made necessary the jettison and consequent contribution?

In the case of *Wellman* v. *Morse*, 76 Fed. Rep., 573, decided by the Circuit Court of Appeals for the First Circuit, the court reviews many of the prior decisions on the subject of the lien for contribution and unqualifiedly holds, that there is such a maritime lien, although in England the law is different.

In the case of *Ralli* v. *Troop*, 157 U. S., 400, the court say:

> "After a voluntary sacrifice of part of the adventure, and a consequent escape of the rest from imminent peril, the owner of the ship (or, in his absence, the master as his agent) has the duty of having an adjustment made of the general average, and has a maritime lien on the interests saved and remaining in his possession for the amount due in contribution to the owner of the ship, and the owner of goods sacrified has a corresponding lien on what is saved for the amount due to him."

The case of *The Irrawaddy*, 171 U. S., 187: In that case the owners of the Irrawaddy filed a libel against the owners of her cargo for a contribution for expenses incurred in the nature of general average for saving the vessel and her cargo which had

been stranded. No question was raised as to the jurisdiction in that case. The amount to be recovered from the cargo was on account of expenses actually paid, although incurred for saving the vessel and cargo. It might have been argued in that case, as it is in this, that the origin of *the cause of action was the payment of money,* and therefore a case at common law for money expended, and not maritime or within the admiralty jurisdiction.

See, also, *The Dora,* 34 Fed. Rep., 343.

The case of *The Wm. Murtagh,* 17 Fed. Rep., 259, is in point. In that case the owner of the canal boat Stackpole filed a libel against the tug Murtagh for the loss of the canal boat and her cargo. Subsequently the owner of the Murtagh arranged with the owner of the cargo that if he would make no claim in the libel, and would abide the event of the suit for the damages to the Stackpole that he (the owner of the Murtagh) would pay any liability that the court found against the latter. The court held that the Murtagh and the canal boat were both at fault for the loss of the cargo and the canal boat, whereupon demand was made upon the owner of the Murtagh for one-half of the value of the canal boat's cargo. Payment was refused and the owner of the cargo filed a libel *in rem* against the Murtagh, based upon the agreement to pay. The court held that after a stipulation is given in a suit *in rem* it stands in place of the vessel released by it, and she cannot be again seized for the same cause of action. Yet, notwithstanding this, the court held that the Murtagh could be proceeded against *in rem* a second time because of the terms of the agreement made with the owner. The cause of action, therefore, was based in the first

instance upon the agreement, but as it referred to a collision damage it was maritime, and the court allowed the suit to be maintained.

In every maritime transaction, whether of *tort* or *contract*, coming within the jurisdiction of an Admiralty Court, if property is concerned a lien is provided, the principal, if not the only exception to this rule being the case of home supplies, and even in this class of cases a lien, if provided by any law, is recognized and enforced in admiralty. *J. E. Rumbell*, 148 U. S., 1.

In the case of *The N. J. S. N. Co.* v. *Merchants' Bank*, 6 How., 344, Mr. Justice Nelson says:

> "If the cause is a maritime cause subject to admiralty cognizance, jurisdiction is complete over the person as well as over the ship. It must in its nature be complete, for it cannot be confined to one of the remedies on the contract, when the contract itself is within its cognizance."

In this case there is also a review of the authorities upon the question of the source and extent of the admiralty jurisdiction of the United States, the question coming up because it was contended that a contract of carriage made on the land was not one within the admiralty jurisdiction.

It has been held that a lien in admiralty may be assigned and enforced in the name of the assignee.

> 19 Am. & Eng. Ency. of Law, 1136, and cases cited.

Taking a bill or note does not extinguish the lien or claim for which the note was given, unless it is so understood. The note is surrendered at the trial.

19 Am. & Eng. Ency. of Law, 1133, and cases cited.

Money borrowed to pay bills stands in the same relation to a vessel as the bill paid.

The Cumberland, 30 Fed. Rep., 449.
The Arctic, 75 Fed, Rep., 601.
The Wyoming, 30 Fed. Rep., 493.
S. Bank v. *Alex McNeill*, 22 Fed. Cas., 13,186.

These are all cases in which the original debt was merged in some other obligation, like a note or a loan, and yet the court recognized the transaction as maritime and within its jurisdiction.

The maritime character of the transaction, arising as it does directly out of a maritime collision, liability is not changed by the payment of the money, nor does it change the forum in which the controversy is to be tried.

III.

THE CLAUSES IN THE BILL OF LADING.

It was claimed in the District Court that certain clauses in the Conemaugh's bill of lading issued to the shippers of her cargo, precluded the right of the latter to maintain a suit against the Conemaugh or her owner for loss or damage to her cargo. This being so, the New York could not recover of the Conemaugh now, what the shippers or their underwriters could not have recovered of her. The Conemaugh not having been liable to her shippers, the New York cannot now hold her for contribution. These defenses were set up in the Conemaugh's answer, and urged at the hearing in the District Court

and passed upon adversely by the District Court.

The appellant in the Circuit Court of Appeals, and respondent or appellee here, did not file assignment of errors, as to the ruling of the District Court, in failing to recognize the defenses contained in the Conemaugh's bill of lading.

Three defenses were urged in the District Court:

First. That no notice in writing had been given by the shipper within 30 days of the date of the loss, as required by the terms of the Conemaugh's bill of lading.

Second. That no action had been brought by the cargo owners for damages, within 3 months of the loss, as required by the bill of lading.

Third. That the Conemaugh was entitled to the benefit of the shipper's insurance under a clause in the bill of lading, which provides that the carrier shall have any insurance and all benefit and advantage to be derived therefrom.

The District Court passed upon these defenses, saying (record, 44):

> "If the libelant was compelled to pay damages for cargo losses, by reason of negligence to which the Conemaugh contributed, as was held by the Supreme Court, then it is of no consequence whether the Conemaugh was liable to her cargo owners or not, and she must be held to be liable for one-half the damages caused by her negligence jointly with that of libelant."

The District Court therefore considered these defenses, and held against them. No assignment of errors was filed as to this action of the court. The record shows that the assignment of errors includes no reference to these defenses. Unless, therefore,

this court chooses to notice errors under its rule the owner of the Conemaugh cannot now be heard upon these propositions.

Grape Creek Co. v. *Farmers' Loan & T. Co.*, 63 Fed. Rep., 89.
Randolph v. *Allen*, 73 Fed. Rep., 23.
Cars Co. v. *Gibson*, 107 Fed. Rep., 365.
U. S. v. *Penna.*, 175 U. S., 500.

Fearing, however, that they may be urged, and the court may consider them we will answer them in their order.

A. *Notice of claim must be given in writing by the shipper of damage to cargo within 30 days after the occurrence of the loss.*

The collision occurred on the 21st day of October, 1891.

On the 11th day of November, 1891, the appellant as the owner of the Conemaugh, and as bailee or trustee of the owners of her cargo, filed its libel against the New York, not alone to recover the damages sustained by the Conemaugh, but to also recover the damages sustained by the owners of her cargo.

Thereby, within less than 30 days after the occurrence of the loss, recognizing that there was a loss to the shipper, and that he was entitled to recover for it, and that it would undertake to see that it was recovered for him. Here we have the carrier recognizing the damage of the shipper, acknowledging it and taking steps to recover it from a third party. It must therefore be estopped by this act from taking the position that it had not had notice of the claim for damages. The object of the notice of a loss

under a bill of lading is to apprise the carrier of the fact that there is loss or damage, so that he may protect himself by early steps to investigate before the evidence has disappeared or be difficult to obtain.

These reasons for the rule are well stated in the case of *Southern Exp. Co.* v. *Caldwell*, 21 Wall., 264, in which Mr. Justice Strong says:

> "The defendants are an express company. We cannot close our eyes to the nature of their business. They carry small parcels, easily lost or mislaid and not easily traced. They carry them in great numbers. * * * They may carry, they often do carry, hundreds, even thousands, of packages daily. * * * If a bailor may delay giving notice to them of a loss or making a claim indefinitely, they may not be able to trace the parcels bailed and to recover them, if accidentally missent, or if they have, in fact, been properly delivered. With the bailor the bailment is a single transaction, of which he has full knowledge, with the bailee it is one of mutitude."

Stipulations in bills of lading require that notice of a loss or damage be given within a stated period, can be waived expressly, or the waiver may be implied from conduct inconsistent with the intent to rely upon the stipulation.

> 5 Am. & Eng. Ency. of Law., 323, and cases cited.

The carrier is estopped from denying the sufficiency of a notice which he had received after the expiration of the time for giving it.

> *Merrill* v. *Am. Ex. Co.*, 62 N. H., 514.

A clause requiring a notice within forty days was held waived because of a promise to pay plaintiff's

claim if made for a reasonable amount, and in this way induce him to delay bringing suit.

Gulf, C. & S. F. Ry. Co. v. *Trawick,* 80 Tex., 270; 15 S. W., 568.

To the same effect are the following cases:

Galveston, H. & S. A. Ry. Co. v. *Seligman,* 23 S. W., 289.

Galveston, H. & S. A. Ry. Co. v. *Kelley,* 26 S. W., 470.

Here the carrier knew and recognized the claim, and by incorporating it with its own, in a libel against the New York, estopped itself from claiming that it had no notice of the loss in writing because it put it in writing when it set it up in its libel against the New York. It practically made out its own notice. It waived any further notice, because it already had and admitted it had full notice of the claim.

B. *The action for damage to cargo must be brought within 3 months after the occurrence of the loss.*

The argument as to the notice applies to this point. The appellant waived the bringing of the action against it because it brought its action for this cargo damage itself, by filing the libel against the New York. After the first decree against the New York in the District Court it made the necessary proof and recovered more than half of this cargo damage by the decree of the District Court which was subsequently reversed.

How can it now say that no action was brought to recover this damage?

Whatever may be said of the reasonableness of the

rule which compels the person damaged to bring action within three months after the damage occurred, it would be unreasonable to permit such a rule to defeat a claim through the act of the carrier himself, who did for the injured person that which the injured person should have done for himself and then, using its own acts to defeat a clear right of action. Suppose that at the expiration of four months after the loss, the owner of the Conemaugh had dismissed so much of its claim for damages against the New York as embraced the claim for cargo damages. As it was not compelled to bring an action for the cargo, it clearly had a right to refuse to go on with it. Would this clause in the bill of lading in that case defeat the right of the shipper to sue the Conemaugh or her owner for the damage? Would not the carrier have been estopped from taking such a position, or, in other words, would the clause be held reasonable and valid under such circumstances? If not, how can it now be held to be valid as against this libelant? Besides, the New York is not suing here as the shipper and is not bound by the terms of the bill of lading. The defense is not available against the New York in this suit.

C. *The carrier is given the benefit of the shipper's insurance.*

The most important of these defenses in this case is, that there was in the bill of lading under which the cargo of the Conemaugh was carried a clause which reads as follows:

> "And the person or party liable who might sustain loss in consequence of owning * * * or being interested in or as to such vessel, shall

have any insurance, however, effected on, as, to or covering the property lost or damaged, and all benefit and advantage to be derived therefrom."

It is contended that the case of *The Phoenix Ins. Co.* v. *E. & W. Trans. Co.*, 117 U. S., 312, as to this clause is decisive. In that case the propeller Merchant, belonging to the appellants in this case, took on a cargo of grain at Chicago shipped by the firm of A. M. Wright & Company, under a bill of lading which contained this clause:

"And the carrier so liable shall have the full benefit of any insurance that may have been effected upon, or on account of said goods."

The Merchant was negligently stranded near Milwaukee, damaging the cargo, which was insured by the Phoenix Insurance Company, and the latter, after paying the loss to the shipper, brought suit against the carrier. The court in that case held that the carrier was entitled to the benefit and advantage of the insurance effected by the shipper, and inasmuch as the shipper had been paid he had therefore no right of action against the carrier, and the insurer could not recover, because he took nothing from the shipper by subrogation.

This case was followed in the case of *Inman* v. *South Carolina Railway Company*, 129 U. S., 128, and in *Wager* v. *Prov. Wash. Ins. Co.*, 150 U. S., 108.

It is therefore contended that inasmuch as the owners of the cargo of the Conemaugh having been paid their losses by the insurers, had no right of action against the Conemaugh to recover damages to the cargo (because of this clause in the bill of lading) and therefore the libelant here (the owner

of the New York) could not recover in this suit because the insurers could not, and therefore what could not be directly done by the shipper or his insurer can not be done indirectly by the owner of the New York. In other words, the New York took nothing by subrogation, and therefore cannot maintain this suit.

In answer to this proposition we have to say that the right to recover in this case is not one resting upon the right of subrogation, but upon the right of contribution. In numerous cases the Courts of Admiralty have held, that there is a right of recovery even when no direct action could be sustained by the shipper against the carrier. Subrogation is therefore not the rule in such cases.

The North Star, 106 U. S., 17.

This was a collision betwen the steamer North Star and the steamer Ella Warley, which resulted in the total loss of the Warley. Both vessels were held at fault, and the damages were to be equally divided. The owners of the Warley raised the point that under the Limited Liability Act of 1851, the Warley having been lost in the collision, the liability ended and the owners of the North Star could not recover from the owners of the Warley any part of their damages, and for that reason they could not deduct one-half of the North Star's damages which the Warley was to pay from the half of the Warley's damages which the North Star was to pay. The court, however, held that there must be deducted from the amount awarded the Warley a moiety of the damages sustained by the North Star. In this connection the courts say, speaking of the decision

of *Chapman* v. *Netherlands Company,* decided in England, if applied in this country:

> "It would enable the owners of the Ella Warley to obtain full compensation for a moiety of their loss, whilst the owners of the North Star would have to sustain both their own entire loss and one-half of that of the owners of the Ella Warley, whilst both vessels were alike to blame for the collision. *A rule which leads to such results can not be a sound one.*"

So here, although each of the steamers should bear one-half of the loss, it is now sought to throw all of it onto the New York.

On February 13, 1893, Congress passed an act known as the Harter Act. The first two sections of this act prohibit the introduction in any bill of lading of any clause which limits the liability of the carrier for losses or damages arising through negligence of itself or its servants, and in the third section of the act the carrier is released from any liability for loss or damage to the cargo, if due diligence has been used to make the ship seaworthy and to select a competent crew to navigate her.

Under this act such a clause as is found in the Conemaugh's bill of lading would be a violation of the law, and would subject the Transportation Company to the payment of a fine, besides making void the bill of lading itself.

Since the passage of this act this court decided the case of *The Irrawaddie,* 171 U. S., 187. In that case the Irrawaddie was negligently stranded, and the owner of the vessel in recovering her and her cargo incurred expenses which, under an adjustment in general average, would be borne jointly by

the vessel and cargo according to the value of each. In this way the owners of the vessel had a claim against the cargo for contribution for these expenses incurred in saving the vessel and cargo, which they sought to collect, contending that the negligent stranding was due to the negligence of the master and crew, and under the Harter Act the owners of the ship could not be held liable for any damages the cargo might have sustained and for that reason, being exempt from all liability, the stranding was the same as if it had occurred without negligence, and that, therefore, the owners had a right to call on the cargo for its proper contribution. The defense on the part of the cargo was that the vessel had been negligently stranded, and that, therefore, the cost of releasing her must fall upon the ship, and that the cargo could not, because of the negligence of the carrier, be called upon to contribute.

This defense by the cargo owner had, prior to the Harter Act, been a good defense, and the court held that it was still good, and that, notwithstanding the Harter Act, the ship must bear the consequence of its negligence under the circumstances, and the cargo was not liable, and need not contribute.

The Chattahoochie, 173 U. S., 540.

In this case the steamer Golden Rule was sunk by the steamer Chattachoochie, and, together with her cargo, became a total loss. The court found both vessels at fault and divided the damages. The Chattahoochie paid all of the Golden Rule's cargo damage, and then was permitted to recoup one-half of this against the amount which the owners of the Chattahoochie were to pay on account of the value of the Golden Rule.

The point was made in that case that under the Harter Act the owners of the Golden Rule were not liable in any way for any part of the loss of the Golden Rule's cargo, and not being liable, the amount which they were to recover for the damages to the Golden Rule should not be reduced by deducting therefrom the damage to the Golden Rule's cargo. The court, however, followed the decision in the case of the North Star, and allowed recoupment, affirming the decision of the Circuit Court of Appeals for the Second Circuit, found in 74 Fed. Rep., 899.

Judge Brown, in the case of *The Viola*, 80 Fed. Rep., 296, referring to the Harter Act and this phase of it, says:

> "On the other hand, there is not the least indication in the Act above named that it was the intention of Congress *to relieve the carrier vessel at the expense of the other vessel in collision cases; that is, to increase the liability of the latter beyond her former liability under the circumstances.* Such a result is not only plainly outside the scope of the Act, but would be in itself so unjust that the third section of the Act ought not to be so construed or applied as to work that result. * * * If that is the design of the Act it would be incompatible with it to permit the cargo owner to turn upon the other vessel to recover what the Act disables him from recovering from his own, to the increased detriment of the other vessel. * * * Consistency, therefore, requires that the extent of the liability of the other vessel, as fixed by the previous law, should remain unchanged."

The Harter Act, as was said by this court in the case of *The Irrawaddie, supra,* was passed for the

purpose of giving the American ship owner the advantages which the English and other ship owners had, when, under their law, they were permitted to make contracts which relieved them from liability for cargo damage in case of the negligence of the master or crew. Under the American law the owner stood liable for the negligence of his master and crew, notwithstanding such clauses, and, by the Harter Act he was prohibited from introducing clauses which limited his liability against his own and his crew's negligence, and the clause in this bill of lading could not now be introduced because contrary to the first section of the Harter Act. Congress, then, by express enactment, relieved the vessel owner from liability, so that we have a statute taking the place of the favorable English contract, and at the same time prohibiting the contract. If, then, the carrier must now, under the decisions of the court in *The Chattahoochie* and *Irrawaddie* cases, respond under circumstances similar to those in this case, how much greater is the reason for calling on him to respond when he has sought to exempt himself by a clause in the bill of lading issued to the shipper, and of which the owners of the New York in this case could not have read, and had no notice of.

Can the owners of the Conemaugh now increase the burden of the New York by resorting to the terms of a contract which was, so far as the New York is concerned, a secret one?

If an express enactment by Congress, of which everyone is bound to take notice as the law, does not relieve him from liability, how can it be said that the secret agreement between the carrier and the

shipper could do so? An agreement of which the New York owners could have known nothing, and which they could not plead to relieve themselves of liability, when called upon to pay by decree.

The agreement has no greater force than the statute. *The North Star* case was decided before this bill of lading was issued. That was the first case in which the principle was laid down that a limited liability act would not relieve one of the *tort feasors* from contribution. That was then and is now the law of the land, and everybody was bound by it. The appellant here, therefore, could not contract, in the face of this decision, so as to increase the burden of a *tort feasor* liable with it for damages.

The New York has been compelled, by the decree of the court, to pay, and it ought not now to bear the whole of the burden when, by law and by the decision of the court, one-half of it should be borne by the Conemaugh, when her only defense lies in a secret agreement between her and her sihpper.

The case of

The Albert Dumois, 177 U. S., 240.

In that case there was a collision between the steamer Albert Dumois and the steamer Argo, resulting in the loss of two lives and serious damage to the Argo. Both steamers were held at fault, and the court decreed that the owner of the Argo could recover one-half of her value, less one-half of the value of the damages sustained by the Dumois, and a sum which was paid by the owner of the Dumois to the representatives of the deceased passengers of the Argo. The contribution was allowed.

Justice Brown based the decision upon the de-

cisions of the court in *The North Star* and *Chattahoochie* cases. There was the further complication in this case that under the maritime law and the laws of Louisiana there was no lien on either vessel for the injuries resulting in death; yet, notwithstanding, this contribution was allowed.

The Geo. W. Roby, 111 Fed. Rep., 601.

In this case, by reason of a collision between the steamer Roby and the steamer Florida, the latter was sunk and with her cargo became a total loss. The owners of the Roby limited their liability to the value of the Roby, and on the trial of the case the court held both steamers at fault. The value of the Roby was not sufficient to pay one-half of the damages sustained by the Florida's cargo, and therefore a contest arose between the owners of the Florida and the owners of her cargo, each claiming the value of the Roby (which was less than half the amount of the damages). In this contest the owners of the Florida contended that the bill of lading which was given to the owners of the Florida's cargo *contained a clause similar to the one now found in the Conemaugh's bill of lading, giving the carrier the benefit of the shipper's insurance.* The shippers of the Florida's cargo therefore could not proceed against the Florida, as they had received their indemnity from the insurance companies, and it was therefore contended that their insurers ought not to be preferred and paid out of the Roby's proceeds until after the value of the Florida had been paid.

In this case, on page 621, the court say:

> "The right of recoupment, which we hold to exist in favor of the Roby, by which one-half of the decree against her cargo lost on the Florida

> has been set off against the decree against the Roby for one-half the value of the Florida, does not depend upon the liability of the Florida for cargo damages, but rests upon the liability of the two colliding vessels to bear equally the burden resulting from a collision due to their mutual fault. In other words, *the right of recoupment does not depend upon the relation of the carrying vessel to her cargo, but upon the relation of the colliding vessels to each other.*"

The claims of the cargo were preferred and the decision of the District Court affirmed.

This case is directly in point. Judge Swan rejects the claim that because the cargo owner had, by contract with the carrier, released the latter from all liability if insured, no claim for recoupment could be made in case of collision.

It all comes to this: If, under the Limited Liability Act of 1851 and the Harter Act, the carrier is not released when it comes to a matter of recoupment and contribution, how, then, can such a release be claimed under a contract with the carrier, when such a release would amount to making one vessel jointly at fault with another, bear the entire burden of the loss? *This is contrary to law, because, when both vessels are at fault, both vessels must share the loss.* This is a rule of law and property; it cannot be set aside or nullified by a contract and bind persons not party to the contract, as it is claimed in this case.

It is said in *The Germanic,* 124 Fed. Rep., 1, that the Harter Act must be strictly construed. This means that nothing shall be given it by implication; thus this contract must be also strictly construed,

and what it releases should not and could affect the rights of those not a party to it.

If, then, the Harter Act does not release the parties in case of collision damage, this contract should not.

IV.

CONTRIBUTION.

The right of the libelant to recover here is based upon the right of contribution, a well known principle in use in admiralty cases. The definition of subrogation we find in Vol. 27, Amer. & Eng. Ency. of Law, page 202, to be as follows:

> "Subrogation is the substitution of one person in the place of another, whether as a creditor or as the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights, remedies or securities."

This principle does not apply, because the recovery here is not the recovery of the owners of the cargo. The libelant is not taking their place and recovering in their right. This, therefore, is not the rule or the doctrine which should be applied. Having been compelled to pay more than a moiety of the damages it sues in its own right. The loss should be borne by both vessels; this is a universal rule of law, and under it each is to pay one-half of the damages. Under it, when all the parties are before the court, *all the damages* are so apportioned—cargo damage as well as the damages to the vessel herself. Recoupment is allowed in all cases, and the damages are equally divided. The New York having paid more than her share is, in equity and good conscience, entitled to be reimbursed for this share.

The rule which does apply and which controls this case is the rule of contribution. It arises in this class of cases in admiralty only. At common law contributory negligence defeats the right of action. In admiralty it does not, but entitles the party guilty of negligence to recover if negligence can be proven against the opposite party. In such a case a plaintiff recovers one-half of his damages.

The rule of division of damages has been well settled by numerous decisions in this country, which may be found in the case of *The Atlas,* 93 U. S., 302.

In the case of *The Alabama and Game Cock,* 92 U. S., 695, the court entered the following decree:

> "The Alabama and the Game Cock, and the respective stipulators severally each for one moiety of the entire damages, interest and costs so far as the stipulated value of the said vessel shall extend, and any balance of such moiety over and above such stipulated value of either vessel on which the libelant shall be unable to collect or enforce, shall be paid by the other vessel or her stipulators to the extent of the stipulated value thereof beyond the moiety due from said vessel."

In this case the libelant was unable to recover one-half of the damages, because the value of the Game Cock was $10,000, which was some $30,000 less than a moiety of the decree against her, so that the Alabama became liable for the major part of the damages. This decision was in direct conflict with the decisions of the English courts in *The Milan,* Lush. Ad., 401, in which case the libelant obtained a decree against each of two vessels for one-half, and if unable to recover it was his loss and did not increase the burden of the co-wrongdoer.

These cases have been followed by numerous decisions since, and plainly recognize the equitable doctrine of contribution, for the foundation of which in courts of common law and chancery we find the early case of *Dering* v. *Earl of Winchelsea*, 1st Cox, 318. This was a suit brought by one surety on a bond against his co-sureties, and in it we find the court saying, on page 321:

> "If we take a view of the cases, both in law and equity, we shall find that contribution was bottomed and fixed on general principles of justice and does not spring from contract. (*Swain* v. *Wall*, 1 Cha. Rep., 149.)
>
> "The doctrine, however, is best defined in the case of *Boardman* v. *Page*, 11 N. H., 431, in which the court, on page 438, says:
>
> " 'The rule of law, then, would seem to be that when one of two or more co-promisers, without assuming any new ground of liability, still continues liable on the original contract to the promise, and is lawfully compelled, by virtue of such contract, to pay the debt, or discharge the original liability of all the co-promisers to the promisee, in such case the equitable liability of the other co-promisers, for contribution of their fair proportion, will still remain, notwithstanding any contract of the promisee for the relief of such other co-promisers, and notwithstanding they may be discharged by the operation of the statute of limitations from that liability to the promisee.' "

In this case the plaintiff sought to hold one other co-maker of a promissory note, and one of the defenses of this maker was, that he had a perfect defense as between himself and the holder of the note and, therefore, the latter could not have recovered a judgment against him upon the note. Upon this proposition the court, on page 435, says:

> "Whatever might have been the nature of the defense set up by the defendant, and which prevailed as against the holder of the note, it is apparent it was not of a character to release the plaintiff from his liability. *And we think it was immaterial what might have been the defendant's ground of defense since it did not avail the plaintiff also; whether it might have rested upon the contract of the payee or upon the statute of limitations.*"

This recognizes that whatever personal defense there may have existed between the holder of a note or bond as against the defendant who is asked to contribute, does not avail him as a defense when called upon to contribute. In other words, he might not be made to pay directly, but could be compelled to contribute to payment when that payment was made by another who had no such defense.

The discharge of a surety from his principal obligation without discharging him from sureties, will not relieve him of his liability to them for contribution.

Campbell v. *Bostwick*, 20 Ohio St., 337.

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In this case it was held that since the right to contribution among common sureties was not founded on the contract of suretyship, but is based on an equity arising from the relation of co-sureties, the discharge of a surety by the neglect of the creditor to sue until the claim against the latter is discharged by the statute of limitations, does not release such surety from his liability to contribute to a common surety who has paid more than his share of the debt.

Chipman v. *Todd*, 60 Me., 282.

It is not a bar to the maintenance of a suit against

a co-surety that plaintiff in a previous suit had abandoned an attachment against the property.

Pin Hill Coal Company v. *Harris,* 7 Ky., 519.

> "One of several joint obligor owners has a right to demand from his co-obligors, the moment he pays a debt, even though his co-obligors have been protesting that no payment shall be made, and this right is assignable in equity."

The same was held to be true also in the case of *Catskill* v. *Messenger,* 9 Cowen, 39.

In *Durrell* v. *Wendell,* N. H. Rep., 360, and a number of other cases cited in the case of *Boardman* v. *Page, supra:*

This case has been followed by the Appellate Court of Illinois in the case of *Byers* v. *Alcorn,* 6 Ill. App., 39, and also in *Drummond* v. *Yager,* 10 Ill. App., 380. In this case, on page 382, the court says:

> "The obligation of contribution is not founded upon contract, but on a principle of equity; and now the principle is universally acknowledged. Any persons acting under circumstances to which it applies are said to act under the head of contract implied from the universality of the principle, and upon this ground stands the jurisdiction assumed by the courts of law."

The remedy of contribution was of equitable origin and rests on equitable principles. After it had become firmly established in equity, the courts of law took jurisdiction on the ground of an implied contract arising from the equitable obligation, and the courts of law, along with the jurisdiction, have taken the maxim that equality is equity.

In the case of *Chipman* v. *Morrell*, 20 Cal., 135, Field, Chief Justice, says as follows:

> "The equitable doctrine, in progress of time, became so well established that parties were presumed to enter into contracts of suretyship upon its knowledge; and consequently upon a mutual understanding that if the principal failed, each would be bound to share with the others a proportionate loss. Courts of common law thereupon assumed jurisdiction to enforce between the sureties, proceeding on the principle that from their joint undertaking there was an implied promise on the part of each surety to contribute his share, if necessary, to make up the common loss. * * * This jurisdiction of the common law courts did not, however, impair the concurrent jurisdiction of equity. Indeed, in many cases, especially where the sureties were numerous, and some of them insolvent, or where some of the sureties had died, courts of equity were alone adequate to afford complete remedy."

In 7th Amer. & Eng. Ency. of Law, page 331, we find:

> "The right is regarded as resting not on the original contractor, but on the relation created thereby of the parties bound by a common obligation and the contract implied therefrom of discharging such common obligation equally."
>
> Citing numerous cases.

Another evidence that the right of contribution does not grow out of the contract, but is based upon the equitable principle of bearing a loss equally with another, is the fact that the statute of limitations does not begin to run until the plaintiff has paid more than his share of the debt. This is announced in 7th Amer. & Eng. Ency. of Law, and supported by a long line of cases beginning in England with

the case of *Wolmeshausen* v. *Gulleck,* 2 Ch. Rep., 514, and followed by the decisions of many states of the United States.

The right of contribution not having begun until the decree in this case was paid by the libelant, there was no right of action until then, and since then the statute of Illinois, limiting rights of action to five years, has not begun to run, and this defense, therefore, is not available to the appellant.

The libelant is entitled to recover the moiety paid, with interest thereon from the date of payment.

Moore v. *Bruner,* 31 Ill. App., 400, and cases cited on page 344 of Amer. & Eng. Ency. of Law.

It may be contended that the doctrine of contribution applies only to relations arising out of a contract, and that there is not contribution between *tort feasors.* Our reply to this is that while we find it frequently stated that there is no contribution between *tort feasors,* this is not by any means, a universal rule, and we find that this rule applies only to cases of intentional and conscious wrong doing, but does not apply to cases which are committed without guilty intent.

In the case of *Bailey* v. *Bussing,* 28 Conn., 455, where the owner of a stage coach sued the driver for contribution and recovered, Judge Ellsworth reviews the English cases and says:

> "A guilty trespasser, it is said, can not be allowed to appeal to the law for an indemnity, for he has placed himself without its pale by contemning it and must ask in vain for its interposition in his behalf. If, however, he was innocent of an illegal purpose, ignorant of the nature of the act which is apparently correct

> and proper, the rule will change with its reason and he may then have an indemnity, or as the case may be, a contribution. * * * The form of action then is not the criterion. We must look further. We must look for personal participation, personal culpability, personal knowledge. If we do not find these circumstances, but perceive only a liability in the eye of the law, growing out of mere relation to the perpetrator of the wrong, the maxim of the law that there is no contribution among wrong-doers is not to be applied. Indeed, we think this maxim too much broken in upon at this day to be called with propriety a rule of law, so many are the exceptions to it, as in the cases of master and servant, principal and agent, partners, joint operators, carriers and the like."

See numerous cases cited 7th Amer. & Eng. Ency. of Law, 365.

This court has recognized the equity of the principle of contribution between wrong-doers in the case of *Selz* v. *Leopold,* 6 Wall., 327, in which it is said:

> "Equal contribution to discharge a joint liability is not inequitable even as between wrong-doers, although the law will not in general support an action to enforce it where the payments have been unequal. *Merryweather* v. *Nixon,* 8 T. R., 186; *Bailey* v. *Bussing,* 28 Conn., 455. Where the liability is joint equal contribution is just, and it would afford the complainants no ground of relief if it appeared that the arrangement with the marshal was such as is alleged in the bill of complaint."
>
> *Ankeny* v. *Moffett,* 37 Minn., 109.

In this case it was held that a person was not deprived of contribution from another also originally liable, where the grounds of their liability is

simply negligence on the part of each in passing on some lawful business.

Horbach v. *Elder,* 18 Pa. St., 33.

In this case five persons were engaged in running a line of stages for certain portions of which stage drivers and horses were to be provided by each, with his exclusive experience, and with his exclusive control of the same. The stage was overturned by the negligence of one of the drivers and several passengers injured. Suits were brought by one of the proprietors and process served on the one only who employed the driver, and one other, and the latter paid about one-half of the liability. It was held that he ought to recover from one of the other proprietors on whom notice had not been served, his proper share of the amount so paid.

Armstrong County v. *Clarion County,* 66 Pa. St.

In this case a traveler recovered damages against a county for injury received. The cases demonstrate that there is in many cases contribution among *tort feasors.*

The rule that there was no contribution among *tort feasors* does not apply to admiralty, because there there is contribution.

In England in the case of *The Frankland,* 9 Asp. M. Cases, 196, in an admiralty case, this principle was recognized. It was a case in which two vessels were held at fault for a collision. One of them had paid damages to a third vessel, and sought to recover one-half of the sum so paid of the other. It was contended that there could be no contribution among *tort feasors,* but the court held that the rule

of division of damages in admiralty must be consistently enforced, notwithstanding the rule at common law, and recovery was therefore allowed.

We base our right to recover here upon the fact that we paid the entire damage to the Conemaugh's cargo. Under the well-settled rules of law one-half of the damages arising out of the collision should be paid by the Conemaugh. The New York, therefore, has paid more than her share, and insists now upon contribution, and, further, that the respondent here can not defend by setting up a defense under the clause of the bill of lading, even though this would operate to discharge the Conemaugh in a suit by the cargo owners against her.

The right of contribution being an equitable right and not arising out of the contract is an independent right, and a suitor has as much a right to invoke it in an admiralty as in a chancery case. In principle it should be as much enforced in an action of *tort* as in one arising out of a contract. That equality is equity is as true in the one case as in the other, and works out justice alike in both. The equitable powers of a Court of Admiralty are particularly well adapted to do this. In this case it is just and right that the Conemaugh contribute her legal share of the sum paid by the New York. This is no hardship.

It is equity and justice.

In this case the Circuit Court of Appeals has held that the admiralty courts had jurisdiction of this case, and that there was a right to claim contribution. It held, however, that all questions as to recovery had been decided by this court and were therefore *res adjudicata*. We have endeavored to show

that the court erred in this, and that this court had expressly held that the "way is open" to a recovery. We believe we have pursued that way, and that, therefore, the decision of the Circuit Court of Appeals ought to be reversed, and the decree of the District Court affirmed, with interest, as under the rules this must be expressly ordered in admiralty cases.

Respectfully submitted.

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Chicago, November, 1906.